

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

<b>Case Title:</b>  Xizhong Hou Right Path Investments (Pty) Ltd  and  Xizhou Zhao Heibei Xinyiang Construction CC Erf One Eight Five Three Klein Windhoek Property CC Remainder of Erf One One Four Klein Windhoek Property CC	<b>Case No:</b> I 247/2015  <b>Division of Court:</b> Main Division  <b>Heard on:</b> 16 June 2022
<b>First Plaintiff</b> <b>Second Plaintiff</b>  <b>First Defendant</b> <b>Second Defendant</b>  <b>Third Defendant</b> <b>Fourth Defendant</b>	<b>Delivered on:</b> 28 July 2022
<b>Heard before:</b> Honourable Mr. Justice Usiku, J	
<b>Neutral citation:</b> <i>Zhao v Hou</i> (I 247-2015) [2022] NAHCMD 371 (28 July 2022)	
<b>Order:</b>	
<ol style="list-style-type: none"><li>1. The first and second defendants' application for rescission of the court orders dated 17 November 2021 and 3 December 2021, is dismissed.</li><li>2. The first and second defendants are ordered to pay, jointly and severally the one paying the other to be absolved, the plaintiffs' costs occasioned by the application.</li><li>3. The matter is removed from the roll and regarded finalized.</li></ol>	

**Reasons for order:**

USIKU, J:

Introduction:

[1] This is an application by the first and second defendants for rescission of two orders granted by this court, dated the 17 November 2021 and dated 3 December 2021 respectively. The rescission of the court orders is sought in terms of rule 103, alternatively in terms of the common law.

[2] The application is opposed by the plaintiffs.

[3] For the sake of convenience, I shall refer to the parties as cited in the action and shall refer to the first and second defendants simply as ‘the defendants’ except where the context indicates otherwise.

Background

[4] In February 2015, the plaintiffs instituted action against the defendants in terms of which the first plaintiff claims from the first defendant, transfer of 50% of the members interest in two close corporations (cited as the third and fourth defendants) together with ancillary relief. In the same action, the second plaintiff claims from the second defendant delivery of three motor vehicles together with ancillary relief.

[5] The defendants entered appearance to defend. The matter proceeded through case management processes. A case management order was issued on 1 June 2016 and the matter was postponed for a pre-trial conference. The envisaged pre-trial conference did not take place and on 15 September 2016, the proceedings were stayed pending the determination of case No 460/2014. Judgment in case No 460/2014 was delivered on 20 April 2017. The plaintiffs indicated that they wished to appeal against that judgment and the current action was repeatedly postponed pending the outcome of the plaintiffs’ appeal. In February 2020, the plaintiffs reported that the appeal in case No. 460/2014 was deemed withdrawn and removed from the roll and that the plaintiff wished to proceed with the present action. The matter was repeatedly postponed due to varied reasons.

[6] On 21 April 2021, the parties were directed to file respective discovery affidavits by 26 May 2021. The plaintiffs were directed to file their witness statements by 23 June 2021. The defendants were directed to file their witness statements by 9 July 2021 and the matter was postponed to 4 August 2021 for a pre-trial conference.

[7] The plaintiffs filed their discovery affidavits by due date. The defendants did not file any discovery affidavit. The plaintiff could not prepare their witness statements in absence of the defendants' discovery affidavit.

[8] On 4 August 2021, the defendants were directed to file their discovery affidavit, among other things, by 17 September 2021 and the matter was postponed to 17 November 2021 for a pre-trial conference.

[9] Again, the defendants did not file the discovery affidavit and still there was no progress in the case.

[10] On the 17 November 2021, the court made an order in the following terms:

'Having heard MR SCHURZ, on behalf of the Plaintiff(s) and MR RITTMANN, on behalf of the Defendant(s) and having read the pleadings for I 247/2015 and documents filed of record:

IT IS RECORDED THAT:

The defendants have still not filed discovery affidavits. Counsel for the First and Second Defendants report that he intends to withdraw as counsel of record. The plaintiff prays for the defendant(s)' defence to be struck. Plaintiff intends to move for default judgment. The court records that the matter has not been moving forward, and due to the non-compliances with court orders, the court hereby makes the following order:

IT IS ORDERED THAT:

1. The first and second defendants' defence is hereby struck.
2. The matter is postponed to 01 December 2021 at 15:15 (Reason: Consideration of the Plaintiffs' application for default judgment).
3. The plaintiffs shall file their application for default judgment on or before 24 November 2021.'

[11] The court order made on 1 December 2021 but dated 3 December 2021, reads as follows:

'Having heard MS DELPORT, on behalf of the Plaintiffs and having read the pleadings for I 247/2015 and other documents filed of record:

IT IS RECORDED THAT:

The First and Second defendants' defence was struck.

IT IS HEREBY ORDERED THAT:

1. The first defendant shall sign all documentation necessary to effect registration of transfer of 50% of the member's interest in the third and fourth defendants from the first defendant to the first plaintiff within ten days from date of this order.
2. Should the first defendant fail to so sign the documentation in prayer 1, that the deputy sheriff of this honourable court, Windhoek, is hereby authorized and instructed to sign the documentation in the first defendant's stead.
3. The first and second defendants are ordered to deliver the following vehicles to the plaintiffs:
  - 5.1 A white Volkswagen T5 Transporter single cab with licence number N5869W and VIN WV1ZZZ7JZC008464;
  - 5.2 A Ford Ranger 3 litre double cab 4x4 with licence number N880880W and VINAFATXXMJ2TBE11151; and
  - 5.3 A silver Land Rover Discovery 4 SDVS6 with licence number N898898W and VIN SALLAAAF3CA622749.
4. The first defendant shall sign all documentation necessary to effect registration of the vehicles in the name of the second plaintiff.
5. Should the first defendant fail to sign such documentation, an order that the deputy sheriff of this honourable court, Windhoek, is hereby authorized and instructed to sign the documentation in his stead.
6. The first and second defendants are ordered to pay the plaintiffs' costs of suit, such costs to include the costs of one instructing and one instructed counsel.
7. The matter is removed from the roll and regarded finalized.'

[12] On 15 December 2021 the defendants delivered the application for the rescission of the above court orders.

#### The rescission application

[13] In their application for rescission, the defendants assert that on 17 November 2021, their defence was struck without:

- (a) notice,
- (b) being given an opportunity to explain the reasons for their default of filing the discovery affidavit and,
- (c) without the court indicating that it intended to consider the imposition of sanctions on that day.

[14] According to the defendants, on 17 November 2021, the plaintiffs' legal practitioner sought the imposition of sanctions against the defendants from the bar and without the defendants being given an opportunity to explain why the discovery affidavit was not filed.

[15] The defendants allege that, thereafter, the court forthwith imposed the sanctions without affording the defendants the procedural right contemplated in rule 53(1) i.e. without being given an opportunity to offer an explanation for the failure to file the discovery affidavit.

[16] In regard to the order dated 3 December 2021 (which was granted on 1 December 2021), the defendants assert that such order was granted in their absence and was premised on the order granted on 17 November 2021. The defendants submit that those orders were erroneously sought and erroneously granted and should therefore be rescinded.

[17] The defendants contend that the issue of the vehicles (referred to in the court order dated 3 December 2021) is *res judicata* between the parties and there was no basis for the plaintiffs to seek judgment in respect of the vehicles because that subject was determined in Case No. 460/2014. The defendants further submit that the first plaintiff has *no locus standi* in respect of the relief pertaining the vehicles.

### Opposition

[18] In opposition to the defendants' rescission application, the plaintiffs submit that the impugned court orders were granted as a result of defendants' non-compliance with, and disregard for, the previous court orders. The plaintiffs contend that the orders in question were neither erroneously sought nor erroneously granted. Furthermore, the plaintiffs argue that the defendants have not shown in their application that they have prospects of success on their defence, on the merits, and that the application for rescission should therefore be dismissed with costs.

[19] In reply, the defendants contend that the deponent to the plaintiffs' answering affidavit was not authorised to oppose the rescission application. In the reply, the defendants admit that they made no allegation as regards prospects of success and deny that same is a requirement in an application of this nature.

### Analysis

[20] In regard to the challenge of authority to oppose the application, I am of the view that the challenge is a weak one and has no merit. Furthermore, there is an affidavit filed by the plaintiffs on 27 May 2022 confirming authority of the deponent to the plaintiffs' answering affidavit. The challenge to the authority to oppose therefore stands to be dismissed.

[21] Insofar as court orders are concerned, the general rule is that once a court has pronounced a final order (or judgment) such order is final and may not be altered by the court or the judge that delivered it. In such event, the court becomes *functus officio* and no longer has authority to deal with the matter<sup>1</sup>. However, there are exceptions to the general rule. Once a court has delivered a judgment or order, rescission is permissible in exceptional circumstances as set out in the rules of the court or under common law.

[22] In the present matter, the defendants bring the rescission application in terms of rule 103(1) or alternatively under common law. Both rule 103(1) and the common law make provision for rescission of judgment/order obtained by default.

[23] The requisites for a rescission in terms of rule 103(1) are that the judgment/order must have been:

- (a) granted in the absence of any party affected thereby, and,
- (b) erroneously sought or granted.

[24] Applying the foregoing principles to the present facts, it appears apparent that the order granted on 17 November 2021 was granted in the presence of the legal practitioner for the defendants. According to the record of proceedings of that day, the managing judge noted that the matter was instituted in 2015 and that there has been a history of non-compliance with previous court orders. Then the court asked the legal practitioner for the defendants to give 'any reason' why the defendants' defence should not be struck in view of the non-compliance. The

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<sup>1</sup> *Spangenberg v Kloppers* (HC-MD-CIV-ACT-OTH-2017/01338) [2018] NAHCMD 81 (5 April 2018) para. 19.

legal practitioner for the defendants offered no reason, but only stated that he is 'in the court's hands'.

[25] For the sake of clarity of what transpired on 17 November 2021, I quote in full the transcribed record of the proceedings of that day:

'MR SCHULZ: As the Court pleases My Lord, for the Plaintiff in this matter.

MR RITTMAN: As the Court pleases My Lord. For the first and second Defendants.

MR SCHULZ: My Lord the Defendant did not file the discovery on the day that they had to file the discovery. They actually filed the status report indicating that it cannot locate its clients, the client is still in China. Unfortunately, according to Your Lordship's clerk the statement reports never reached Your Lordship's chambers.

COURT: No.

MR SCHULZ: They were already filed in October so maybe My Learned Friend can address you on that.

COURT: I suppose it was incorrectly filed. It does not solve the matter. What is the position with you and your client?

MR RITTMAN: My Lord I am unable to make any contact with them and I informed My Learned Colleague that I wish to withdraw from this matter, and I have got an email address that I do not know if it is working but that is the only way I can serve the notice on there.

COURT: Your client is in China?

MR RITTMAN: Yes, My Lord.

COURT: Well if you want to litigate in Namibia he must come to Namibia or either stay in China.

MR RITTMAN: It looks like he is going to stay in China.

COURT: Well, this matter is coming from 2015.

MR RITTMAN: That is correct My Lord.

COURT: We have been battling with this matter for six years and we are going nowhere. Is there any reason why I should not simply dismiss the Defence?

MR RITTMAN: My Lord I am in the Court's hands.

COURT: There has been a history of non-compliance with Court orders and every time we are told 'my client is in China'. He is free to litigate here but he has obligations and it is now six years down the line and we are going nowhere.

MR RITTMAN: Yes the case was with various other lawyers previously.

COURT: Yes I know. Not that they achieved much more than you did with all respect to them.

MR SCHULZ: Yes My Lord, then I agree with My Learned Friend that he can file his notice of withdrawal unless Your Lordship wants to strike the Defence but (intervention)

COURT: I do not see why I should keep this matter on the roll indefinitely. Even if I grant the Defendants legal practitioner leave to withdraw there is still no reason why I should not strike the Defence, whether he

is represented or not.

MR SCHULZ: Yes My Lord. I agree My Lord.

COURT: You want to apply for Default Judgment?

MR SCHULZ: Yes My Lord.

COURT: On what, the date?

MR SCHULZ: Even the next week or the week after.

COURT: No the 1st of December will be earliest date.

MR SCHULZ: That will be in order My Lord.

COURT: Matter is postponed to the 1st of December 2021 for the Plaintiff to apply for Default Judgment in the matter.

MR SCHULZ: As the Court pleases.

MR RITTMAN: As the Court pleases.

COURT ADJOURNS UNTIL 2021.12.01.'

[26] Accordingly, the defendants were present at the hearing on 17 November 2021 as their legal practitioner was present and was afforded opportunity to make submissions on why the defendants' defence should not be struck. The judgment/order in question was therefore granted in the presence of the defendants.

[27] The legal practitioner for the defendants did not indicate that he required more time in order to give a comprehensive explanation for the non-compliance. When invited to put forth any reason why the defence should not be struck, he offered none.

[28] It is reprehensible for the deponent to the defendants' founding affidavit, to state under oath that the facts stated therein are within his personal knowledge and are true and correct, and allege that the defendants' defence was struck without giving the defendants opportunity to explain the reasons for the default. It is equally reprehensible for the defendants' present legal practitioner to put forth the same argument in his heads of argument and in oral argument in court, when the application was heard, when he could and should have obtained the transcribed record of proceedings, to ensure that the argument and the serious allegations he was making, are true.

[29] Insofar as the court order of 1 December 2021 (dated 3 December 2021) is concerned, the defendants allege that such order was erroneously granted in their absence.

[30] It is apparent from the record that on 17 November 2021 when the court made the order



striking-out the defence of the defendants, the matter was postponed to 1 December 2021 for the consideration of the appropriate relief. The legal practitioner for the defendants was present when such order was made.

[31] I am of the opinion that rule 103(1) does not apply to a situation where an affected party was informed of a hearing and the relief that may be sought and such party declines or fails to attend or participate, in those proceedings. In the present matter, the non-appearance of the defendants at the hearing of 1 December 2021 does not constitute an error in respect of the granting of the order dated 3 December 2021. The order dated 3 December 2021 cannot, therefore, be rescinded on the ground that it was erroneously granted in the absence of the defendants.

[32] In the alternative, the defendants seek rescission of the two court orders, on the basis of the common law. The requirements for rescission under common law are:

- (a) an applicant is required to provide a reasonable explanation for its default, and,
- (b) the applicant is required to show that it has a *bona fide* defence, which has reasonable prospects of success on the merits of the main matter.

[33] Both of the foregoing requirements must be met for the application to succeed.

[34] In the present matter, the defendants' defence was struck on 17 November 2021 for failure to comply with court orders and the defendants having failed to furnish a reasonable explanation for the non-compliance. In other words the defendants were afforded an opportunity to provide a reasonable explanation for the default and failed to do so. In the present circumstances, I am of the opinion that rescission is not the appropriate procedure. I am of the view that, where a party was afforded an opportunity to be heard, before an order is made, the appropriate procedure is either to appeal or take the decision on review.

[35] For the foregoing reasons, I am of the view that the defendants do not have legitimate grounds for rescission, either within the ambit of rule 103(1) or common law and the application for rescission falls to be dismissed.

[36] As regards to the issue of costs, I am of the view that the general rule that costs follow the event must find application in this matter.

[37] In the result, I make the following order:

1. The first and second defendant's application for rescission of the court orders dated 17 November 2021 and 3 December 2021, is dismissed.
2. The first and second defendants are ordered to pay, jointly and severally the one paying the other to be absolved, the plaintiffs' costs occasioned by the application.
3. The matter is removed from the roll and regarded finalized.

<b>Judge's signature</b>	<b>Note to the parties:</b>
B Usiku Judge	Not applicable
<b>Counsel:</b>	
<b>Plaintiffs:</b>	<b>Defendants:</b>
A Delport Of Delport Legal Practitioners Windhoek	T Kasita Of B D Basson Incorporated Windhoek